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DUE PROCESS AND PUNISHMENT

"TO threaten such a man with punishment," wrote Sir James Fitzjames Stephen,[1] "is like threatening to punish a man for not lifting a weight which he cannot move."

"No state shall * * * deprive any person * * * of life, liberty or property without due process of law," are the sonorous words of the Fourteenth Amendment.

The idea which the man in the street would get from the Constitution would probably be epitomized in the phrase "fair play." Such an unenlightened person would also doubtless feel that Stephen's supposititious case would be both absurd and palpably unjust. And even if he were told that a "comparatively insignificant taking" of liberty or property "in aid of what is held by strong and preponderant public opinion to be greatly and immediately necessary to the public welfare"[2] would not be a denial of due process of law, he would still, perhaps, shake his head in dissent if asked to square such punishment with his notion of the Fourteenth Amendment.

Modern legislators, courts and jurists—or some of them—seem to have no such difficulty. Nowadays we punish men more frequently for not lifting weights which they may not be able to move, without permitting them to show, if they can, that they could not move them, than for offenses characterized by some wicked design or purpose. And the superiority of the trained judicial intellect over the primitive and hopelessly individualistic mind of the common man is shown by the following argument in support of such a policy, which we may put in terms which the wayfarer can not fail to understand:

"You see, the lifting of this weight is a matter of grave public concern; some men can lift it, but if we give them a chance, they will pretend that they can not. So we'll just punish everybody who fails, on demand, to lift the weight, without regard to ability to move it; thus we'll catch the fellow who can, but won't, and insure the lifting of the weight; and as for the rest, who perhaps would,

[1] HIST. CR. LAW, Ch. XIX, Vol. 2, p. 172.

[2] Mr. Justice Holmes, in Noble State Bank v. Haskell, 219 U. S. 104.

but can't, they have their due process of law in the inspiring thought that they have suffered for the common good."

That there actually is such a doctrine; how it came to exist; that it is pure sophistry and utterly false, and that it is spreading dangerously, so that the basis upon which the true principle is founded should be sought for, are the subjects of this paper.

Let us, for hypothetical purposes, define a "crime" as any objective occurrence to which the law attaches the consequence of punishment. "Punishment" we understand as including any corporal restraint or infliction so consequentially imposed upon a human being, or any pecuniary mulct so exacted from a human being or a corporation, the amount of which bears no relation to any possible valuation of actual or theoretical injury suffered: it may also include less usual expedients, such as outlawry, civil death, disfranchisement, forfeiture of office, or even mere official degradation or censure—that is, the word is used in its broadest sense. "Law" includes the Constitution.

Are the elements of crime wholly objective? Does the law really predicate punishment upon events alone? Or is our conventional definition too narrow; and should it include a subjective term? If so, what is that term?

No doubt the mere statement of the questions in this form will elicit mental protest on the part of the reader. The classical way has been to separate crime into an "act" and an "intent"; and to state the "general rule" in terms of the hoary maxim, *"actus non reum nisi mens rea"*; following such statement, however, with the "exceptions," to the effect that in "statutory crimes," or in some classes of offenses otherwise defined, *mens rea* is or may be dispensed with. Another way of putting the same thing is to say that at common law "criminal intent" was an essential element of all crimes *mala in se;* but that in creating new offenses, or altering the old ones (which is the same thing), the legislature may "do away with" this element, and attach punishment to what remains—the "act."[3] Such a statement is, of course, more or less sound historically, and suggests principles that are of service in the interpre-

[3] MAY, CR. LAW, Sec. 53; People v. Werner, 174 N. Y. 132; Shevlin-Carpenter Co. v. Minn., 218 U. S. 57.

tation of criminal statutes.[4] But it is inadequate as a statement of the problem. The "criminal intent" that can be eliminated from the predicate of punishment cannot be an element of crime in the abstract. It is merely a variable quality found in some of the specific offenses.[5] We are told by some that "criminal intent" and "specific intent" are to be distinguished. Analysis tends to show either,—

1. That all "intent" is "specific," or,

2. That it is not true that criminal intent properly defined can be eliminated from crime.

Let us then adhere to our hypothesis and proceed to question its correctness as an abstraction, understanding that, for many partic-

[4] Lord Kenyon, C. J., in Fowler v. Padget, (1798) 7 T. R. 509; Cockburn, C. J., in Reg. v. Sleep, (1861) 8 Cox C. C. 472, 478; Bramwell, B., in Reg. v. Prince, (1875) L. R. 2 C. C. 154; Wills, J., in Reg. v. Tolson, (1889) 23 Q. B. D. 168, 171; Stephen, J., in s. c., p. 184; Wright, J., in Sherras v. DeRutzen, (1895) 1 Q. B. 918. STEPHEN, HIST. CR. L., Vol. 2, 117.

Numerous American cases exemplify the rule of statutory interpretation in which the influence of the maxim is exerted. See *infra,* note 6.

The law has undoubtedly undergone change on this point. No better example of the evolution which has taken place has been found than that afforded by certain Ohio decisions, all involving statutes from which the word "knowingly," or its equivalent, has been omitted. In Birney v. State (1837), 8 Ohio 230, and Miller & Gibson v. State, (1854) 3 O. S. 475, the omitted words were read into the statute; this view seems to have been wholly supplanted by that in Farrell v. State, (1877) 32 O. S. 456, and Crabtree v. State (1876), 30 O. S. 382, (*semble*), to the effect that their absence merely shifts the burden of proof as to *"scienter"* to the defendant; (see Com. v. Elwell, (1840) 2 Metc. 190, 192), then, yielding to the modern (or "Massachusetts," *vide* Bishop, op. cit., *post*) view, Ohio v. Kelley (1896), 54 O. S. 166 (a pure food case) allowed the inference that the legislature meant to eliminate ignorance or mistake entirely. The deterring effect of the maxim is plainly discernible in this judicial history. It is interesting to note that in the more recent case of Kilbourne v. State, (1911) 84 O. S. 247, the Ohio supreme court, citing the earliest cases with approval, held *unconstitutional* a statute (having stolen railway property in possession) which it felt obliged to construe as eliminating knowledge. It is difficult to see why this holding could not have been avoided by following Farrell v. State, *supra.*

[5] Stephen, J., in Reg. v. Tolson, *supra,* p. 186; Sir Richard Couch in Bank of New South Wales v. Piper, (1897) A. C. 383, 389; STEPHEN, HIST. CR. LAW, Ch. XVIII, Vol. 2, p. 95; KEEDY, INSANITY AND CRIMINAL RESPONSIBILITY, 30 HARV. L. REV. 535, 540.

ular offenses, subjective facts—states of mind—are to be added. Does the law as a whole—including the Constitution—add any universal mental element to the objective result as a basis of punishment?

Innumerable *dicta* seem to return a negative answer to this question in general terms.[6] But examination of the case raises a doubt

[6] Among them, the following frequently cited passages may be quoted: "I agree that there can be no crime without a criminal intent; but this is not by any means a universal rule. * * * Many statutes which are in the nature of police regulations * * * impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." Cooley, J., in People v. Roby, 52 Mich. 577, 579.

"The validity of the statute is assailed on the ground that it converts * * * an innocent act into a criminal offense * * *. The power of the legislature to define and declare public offenses is unlimited except in so far as it is restrained by constitutional provisions * * *. It is the province of the legislature to determine in the interest of the public what shall be * * * forbidden. * * *" Andrews, J., in People v. West, 106 N. Y. 293, 295, 296.

"While it is an axiom of the law that there can be no crime without criminal intent, there are many cases where the execution and enforcement of the law demand that the intent be implied * * *. The fact being established, the law supplies the element of intent." Chadwick, J., in State v. Nicolls, 61 Wash. 142, 145.

"It is declared by St. 1871, c. 83, that no railroad corporation shall * * * occupy a highway * * * with cars or engines for more than five minutes at one time."

"The defendant * * * asks the court to rule that there can be no conviction, if it is shown that the obstruction complained of was accidental, and could not have been avoided or removed by the exercise of reasonable care * * *. These instructions * * * were properly refused * * *. The obstruction complained of is made a nuisance by the statute and is punished as such. The prohibition is absolute; it applies expressly to all cases where the occupation or use of a highway exceeds five minutes at any one time, whether that occupation be reasonable or unreasonable, necessary or unnecessary. Knowledge or guilty intent is not an essential element in the commission of the offense * * *." (Citing Com. v. Emmons, 98 Mass. 6 (selling contaminated milk); Com. v. Farren, 9 Allen 489 (selling intoxicating liquor to minor.) Colt, J., in Com. v. N. Y., N. H. & H. R. R. Co., 112 Mass. 412, 418. The evidence in the case showed that a connecting railroad had shoved a cut of cars upon defendant's tracks, colliding with defendant's cars, so that, in order to move the whole number of cars from the crossing within the time limit, it was necessary to move them as one train; and that when the attempt to do so was made, the train broke in two near the engine,

as to whether or not fundamental issues have been decided or really considered in most of them. In order to present the ultimate question which is believed to exist, it is necessary to make an important distinction. Specifically, it may be admitted that there is not now any basis for the assertion that corrupt purpose—*i. e.*, motive, to be exact—knowledge of the existence of facts, or knowledge of the law are indispensable elements of crime. But it is submitted that the elimination of these elements does not logically justify the

so that more than five minutes elapsed before the crossing was cleared. Obviously, no question of "guilty knowledge" was involved here; yet the cases dealing with knowledge as an ingredient of the offense are the only ones cited. No constitutional question was raised. See Com. v. N. Y. C. & H. R. R. Co., 202 Mass. 394, a case under the same statute, where the defense was based upon the unknown malicious interference of third persons in opening the air cocks and setting the brakes. Braley, J., in the opinion sustaining a conviction, said (p. 396): "In statutory offenses created in the exercise of the police power, unless a wrongful intent or guilty knowledge * * * is made an essential element of the prohibited act, the violator may be convicted and punished, even if he has no design to disobey the law." Numerous decisions involving "guilty knowledge" are cited.

"Nothing in law is more incontestable than that, with respect to statutory offenses, the maxim that crime proceeds only from a criminal mind does not universally apply." Beasley, C. J., in Halsted v. State, 41 N. J. L. 552, 589.

"The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned." Mr. Justice Harlan in C., B. & Q. R. Co. v. U. S., 220 U. S. 559.

The above cases have been selected, almost at random, as instances of the careless utterance of *dicta* or, perhaps, of failure properly to qualify statements true as applied to the facts before the court. The Massachusetts cases quoted, however, suggest at least the possibility of erroneous results; and that such a result is sure to follow the frequent repetition of such loose language sufficiently appears from the outrageous decisions in People v. Fernow, 286 Ill. 627, and People v. Johnson, 288 Ill. 442, (*infra*, note 17). On the facts of these cases the respective defendants were culpable enough, but the court admitted that the statute applied equally to a possessor of a motor vehicle who could have no reason to suspect that the number had been defaced. The old *dicta* about the immateriality of "knowledge or intent" in prosecutions under statutes enacted in the exercise of the "police power" were repeated and relied upon to support (as, indeed, they do support) this extreme result.

rejection of the concurrence of *will* as a condition of punishment.[7] Whether or not punishment can be inflicted upon a person on account of an objective detrimental occurrence to which the will of the person has in no manner (within the bounds of reason) con-

[7] It is believed that the whole difficulty arises from an over-statement of a true principle by the commentators of the seventeenth and eighteenth centuries, followed by a reaction which swung too much the other way. Thus, SIR MATHEW HALE, in his "PLEAS OF THE CROWN," Ch. II, says:

"Man is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law * * * and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey: The consent of the will is that which renders human actions either commendable or culpable; * * * where there is no will to commit an offense, there can be no transgression * * * and because the liberty of choice of the will presupposeth an act of the understanding to know the * * * action chosen by the will, it follows that, where there is a total defect of the understanding, there is no free act of the will."

He was followed by SIR WILLIAM BLACKSTONE, in his COMMENTARIES, Book IV, Ch. II, wherein he said:

"All the several * * * excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, *the want or defect of will.* * * * To make a complete crime cognizable by human laws, there must be both a will and an act. * * *

"* * * There are three cases, in which the will does not join with the act:

1. When there is *a defect of understanding.* * * *

2. *Involuntary act* * * * which is the case of all offenses committed by chance or ignorance * * *.

3. *Unwilling act*, duress * * *."

It is believed that there is error in these statements, in so far as mere ignorance (or mistake) of fact is treated therein as if it were universally the equivalent of lack of intentionality—*i. e.*, the involuntary. It is submitted that, at the least, some qualification of these portions of the statements quoted is necessary. Yet the error persisted for some time. (See JOEL PRENTISS BISHOP, "NEW CRIMINAL LAW," Ch. XIX, *passim*, particularly § 303a, note 6; Brett, J., *dissentiente* in Reg. v. Prince, L. R. 2 C. C. 154—a most unfortunate case, on the facts, for the application of such a theory; Farrell v. State, *supra*); and in the struggle of ideas which ensued the victorious opponents of this confusion of will and knowledge have seemingly taken extreme ground on the other side and repudiated the entire principle laid down by HALE and BLACKSTONE. (See note 6, *supra.*)

tributed, is then the question.[8] This question is to be considered on the supposition that the legislature has made the attempt by enacting language so clear as to overthrow all contrary presumptions. It thus ultimately becomes a question of constitutional law.

Let us take the classical viewpoint and inquire what is an "act." Reflection discloses that an act may be positive or negative. That is, that element of crime which, in the classical definition, constituted its objective part, may consist of something done by a person or something omitted by him. The line between the two, which for purposes of convenience will be hereinafter designated as an "act"

[8] It may be objected that "will" is an ambiguous term, or that its very use in this paper implies an assumption of a false philosophical basis or a psychological fact that does not exist—viz., "freedom of the will." It is true that the word "will" or "volition," as it might well be called, defies exact definition, inasmuch as it is very close to a primary or absolute concept. The description of it given by CHARLES MERCIER in his work, "CRIMINAL RESPONSIBILITY," p. 31, shows the sense in which the writers use the term: "It is felt to be an activity exerted by the whole self,—a direction of activity, and more than a direction, an exertion, an initiation, an outpouring of activity in a certain direction."

As to the other possible criticism, it is to be admitted frankly that freedom of the will has been assumed as an attribute of the "normal" human being—*i. e.*, one whose intellectual or moral faculties are not limited beyond a certain point. The bounds of this paper do not permit discussion of these points, and such discussion is felt to be out of place for the following reasons, none of which could be appropriately demonstrated herein:

(1) The Anglo-Saxon (and, in large part, the continental) jurisprudence assumes freedom of the will (many of the citations in this article may be brought to the support of this proposition); (2) the decided weight of philosophical speculation supports it; (3) the best opinion of modern psychologists and criminologists declare its existence in the sense contended for; (4) and lastly, if it be rejected, and the determinism of the positivists in criminology (see LOMBROSO, "CRIME, ITS CAUSES AND REMEDIES") be accepted completely in lieu of it, the effect would be, it is submitted, to destroy the whole system of criminal law, and to substitute in its place a scheme of social control of what we now call "crime" based upon the principle of clinical treatment of the "criminal" or correction of his environment, which would be the utter antithesis of "punishment" as we have defined it. In other words, it is felt that as freedom of the will is basic to criminal jurisprudence, we must necessarily assume its existence. As SALMOND says (JURISP., § 128), "as to the nature of the will and the control exercised by it, it is not for lawyers to dispute, this being a problem of psychology or physiology, not of jurisprudence."

and an "omission," is somewhat difficult to draw. Yet it is clear enough that it exists.

Take the "act" proper. Can it take place without the concurrence of the will? In an effort to reduce it to its lowest terms it has been defined as a voluntary muscular contraction.[9] Can it be less than that? Suppose there is a motion of the body without a voluntary muscular contraction. This may come about in several ways —*i. e.*, somnambulism, hypnotism, volitional insanity ("irresistible impulse"), coercion, etc. Or suppose the objective result interdicted has come about through the "act of God" or an inevitable accident; can it be imputed to the defendant as his "act" because he may have been engaged at the time in some particular enterprise, or because he sustained some relation, as that of owner, to the physical thing wrought upon by causes to which his will did not contribute in such a way as to produce the result which constitutes the objective element of a crime?

Greater difficulty is encountered in stating the question as to the relation of the will to an "omission" in terms consistent with the classical point of view. Yet this way of putting it may be hazarded: Can a person be charged criminally with the consequences of failure to act—*i. e.*, to exercise his will and thus to put in motion forces calculated to bring about the result commanded, when he is able to show that he actually did, in good faith, exercise his will to the end desired, but his efforts were frustrated by extraneous causes wholly beyond any control that it was physically possible for him to exert (unless "physical possibility" be given an absurdly extreme

[9] "An act, it is true, imports intention in a certain sense. It is a muscular contraction, and something more. A spasm is not an act. The contraction of the muscles must be willed." HOLMES, "THE COMMON LAW," p. 54. See also p. 91.

"By 'events' jurists mean those occurrences which take place independently of human wills. By 'acts' they mean those which are subject to the control of the human will and so flow therefrom. Acts, then, are exertions of the will manifested in the external world." POUND, "READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW," p. 453.

"The term act is ambiguous * * *. When it is said, however, that an act is one of the essential conditions of liability, we use the term in the widest sense of which it is capable. We mean by it any event which is subject to the control of the human will." SALMOND, JURISP., § 128 (but see § 132—discussion of *mens rea*).

meaning)? Or even that, though he did not so exercise his will, circumstances were such that any attempt on his part to do so would have been fruitless?

It is well said that the creation of crimes is an exercise of the police power—the state's right of self-defense. Is it not fundamental to the exercise of this power that legislation to this end be expressed in the form of prohibition or of command? Do we not speak accurately in common parlance when we speak of "violating" or of "complying with" the law? Are not the words of the Decalogue—"thou shalt" and "thou shalt not"—most finely expressive of the "compulsion" and "restraint" which are said to be the fundamental methods of the police power?[10]

In short, from the standpoint of constitutional law, can the state punish for less than a violation of its commands or prohibitions; and are not those commands and prohibitions addressed to the will? Do we not, by the criminal law, *regulate conduct;* and can there be conduct without either positive will or the lack of it where it could be effectual?

Two distinct reactions to the statements of the question which have been made are likely. Some will say that the whole inquiry comes too late, in that the plenary power of the legislature to create crimes and punish them is now too firmly established to be shaken. These will have in mind the pure food and liquor cases and others of similar character. Others will conceive of our extreme statements as men of straw, easy to knock over, but having no real existence. An answer to both objections alike is found on the one hand in numerous cases and writings which seem, at least, to assert a doctrine as extreme as that which we have paraphrased at the beginning of this paper; and on the other hand in a smaller number of cases wherein a line has been drawn and the Constitution expressly or impliedly applied,[11] and in some well-considered articles and

[10] FREUND, POLICE POWER, § 3.

[11] Kilbourne v. State, 84 O. S. 247 (having stolen railway property in possession); State v. Strasburg, 60 Wash. 106 (act abolishing defense of insanity); State v. Kartz, 13 R. I. 528 (being the owner of a place having the reputation of a "speak easy"); see State v. Beswick, *id.* 211; compare the decision of the same learned judge (Durfee, Ch. J.) in State v. Smith, 10 R. I. 258; State v. Divine, 98 N. C. 778.

In State v. O'Neil, 147 Iowa 513, the defendant was convicted of an

opinions in which the possibility of the existence of such a line has seemingly been recognized.[12] It is submitted that if the con-

offense purely "statutory" from which "knowledge" and "intent" had been eliminated to the usual extreme degree; but the offense had been committed after the supreme court of the state had held the statute unconstitutional and before this decision had been overruled by a subsequent case sustaining the law. The entire court concurred in reversing the conviction, though the judges did not agree among themselves. The prevailing opinion was written by McClain, J. In it he said (p. 522), "mere ignorance of the law does not excuse, and even ignorance of fact which the statute, expressly or impliedly, makes it the duty of one acting in reference to the subject-matter regulated by the statute to know, and with reference to which he is required to act at his peril, will not excuse him. *But even as to these strict rules there are necessary exceptions.*" (Italics ours.)

[12] See report of committee of Am. Instit. of Criminal Law and Criminology, 2 JOUR. CRIM. LAW AND CRIMINOLOGY, 532, (but the question is ignored by the chairman, Professor Keedy, in his articles in 30 HARV. L. REV. 535, 724.

Prof. John R. Rood, though severely criticising State v. Strasburg in 9 MICH. L. REV. 126, says (p. 133), "there may be a line that should be drawn."

WILLIAM LAWRENCE CLARK in 16 CORP. JUR. 1, 78, title "Criminal Law," treating of "intent" (as an element of) "acts prohibited by statute," after stating the "exception to the rule" in the usual way, says: "But the rule applies only to unlawful acts which are voluntarily, and in this sense intentionally, done." For this, he cites Louisville R. Co. v. Com., 130 Ky. 738, where there is at least a *dictum* to that effect.

In the same context, Mr. Clark gives the Strasburg case as authority for this statement: "It has been held, however, that the police power of the state, even though broad enough to authorize the legislature to eliminate the element of intent in defining crime, is not without limitations, and that a penal law will not be valid where it makes criminal an act which the utmost care and circumspection would not enable one to avoid."

In U. S. v. K. C. S. R. Co., 202 Fed. 828, 833, Van Valkenburgh, J., speaking of a proviso in the hours of service law excusing the carrier "where the delay is the result of a cause * * * *which could not have been* foreseen," said, "by this act it is sought to prevent railroad employees from working consecutively longer than the period prescribed, as completely and effectively *as could be accomplished by legislation*" (italics are the present writers'). But the act might have had no proviso whatever, and might have clearly excluded any and all defenses. Would this have been going further than "could be accomplished by legislation?"

Church, Ch. J., in Gardner v. People, 62 N. Y. 299, after stating the classical "rule and exception," said, "the act prohibited must be intentionally done. A mistake as to the fact of doing the act will excuse the party,

stitutions do establish limitations on the police power of the legislatures in the creation of crimes and the imposition of punishments, the tendencies of present-day legislation make it worth while to attempt a definition of such limitations, however infrequently in the past the courts may have felt called upon to apply them.

Brief reflection will disclose the existence of at least one obvious limitation on the exercise of the police power in the creation and punishment of statutory crimes. That is the limitation inherent in the very nature of the power itself, or, more accurately, that imposed universally upon its exercise by the "due process" clause of the federal Constitution and similar provisions of the bills of rights of the state and federal constitutions. Infringements of liberty and property rights of the individual plainly and palpably unjustified by any public necessity are theoretically prohibited by such constitutional provisions, however liberal the present attitude of the courts may be toward the existence of such public necessity in particular cases. And if necessity as a justification be a matter of degree, it would seem that the stigma of crime and punishment should be regarded as the most drastic of the methods of the police power, and therefore as requiring a clearer showing of necessity as a justification than might support less harsh methods of the exercise of that power: some of the cases may be explained on this ground alone.[13]

but if the act is intentionally done the statute declares it a misdemeanor, irrespective of the motive or intent."

Compare Bruhn v. Rex, (1909) A. C. 317, an extreme case, which, for reasons hereinafter to be developed, is not in point on the theme of this paper, but illustrates finely the tendency of modern "regulatory" legislation. The case, however, is consistent with the principle by which the criminal liability of a master for the acts of his servants is sustained.

[13] A comparison of the criminal with the civil cases reveals the rather astonishing fact that the courts are much more inclined to apply the limitations of the due process of law clauses to legislative acts imposing civil than to those imposing criminal liability. It would seem that the opposite ought to be the rule, for surely the imposition of a criminal sentence is or may be far more oppressive upon the individual than the imposing of a civil liability. If, for example, the state has no power to make a railway company liable civilly for all cattle killed by its trains, regardless of fault, 25 L. R. A. 162, note; 35 L. R. A. n. s. 1018, note, or an owner of an automobile liable for all damage done by his car when driven by another, if that other be a trespasser, Daugherty v. Thomas, 174 Mich. 371 (but see Hawkins

Let us assume, then, that a certain event is so detrimental to the public welfare that the exertion of the police power to the utmost degree possible is justified for its prevention. By this assumption we lay on one side all questions as to the power to control human conduct, including the acquisition, use and disposition of things, and, in the absolute sense, all question as to the power to choose punishment as a method, by way of sanction for the commands or prohibitions laid upon individuals by the law to be enacted. Can such a law constitutionally declare that such punishment shall be inflicted upon a person, if the offensive thing occurs, thereby making such person an insurer, at the risk of such punishment, against the occurrence? Some of the cases would seem to say yes, if the person be engaged in the commission of an act of which the offensive objective fact is a concomitant. The act is said to be done at peril. At peril of what? Obviously, at peril of the existence of the fact which forms the real basis of punishment. Thus, in the sale of adulterated food, the "act" is really a sale of something for use as food. It is false to think or to speak of the adulteration as a part of the act. It is merely a concomitant fact, the presence of which makes the act itself, which would otherwise be innocent, punishable.[14] But the act proper—the selling of food—is, under

v. Ermatinger, 211 Mich. 578), or a railway company liable for funeral expenses in cases of all persons killed by its trains, Ry. v. Lackey, 78 Ill. 55, or an owner of land liable for all damage done by the escape of fire from his premises, Eastman v. Logging Co., 69 Ore. 1, or an owner of logs for logs floating in river without being rafted where not voluntarily so set loose, Craig v. Kline, 65 Pa. St. 413; then surely there must be some limitation upon the power of the state to make criminal the happening of the same or similar events. It is the conviction of the writers that the allocation of the burden of an actual loss is one thing, and the imposition of punishment is another, however confused and intermingled the two may have been eight hundred years ago. Therefore, civil liability without fault might be supported without justifying punishment without fault. (For discussion as to whether or not the tendency in tort law is toward or against the doctrine of liability without fault, see article by Dean Pound in 27 HARV. L. REV. 233, and articles by Professor Jeremiah Smith in 33 HARV. L. REV. 542, 667; Professor Whittier in 15 HARV. L. REV. 335; Professor R. M. Perkins in 5 IOWA L. B. 86.)

[14] STEPHEN, "DIGEST OF CRIMINAL LAW," p. 20, art. 34, refers to the incriminating fact in this class of cases as "an independent act"—*i. e.*, independent of the "act of the offender." The learned author's meaning may

the statute, done at the peril of the existence of adulteration in the food product sold.[15] In a very true sense, the actor must avoid the punishment by positive precautions rather than by forbearance. It is assumed that the retailer *can* take such precautions with effect—*i. e.*, test every article before selling it, so discover the adulteration, if present, and thus avoid punishment by not selling. If he neglects this onerous task, or even if he performs it imperfectly, he wills the unknown consequence by consciously acting in indifference to it; he "takes a chance."[16]

have included "independent event." In either sense it is clear that anything that is "independent" of an act can be no part of it. Compare Stephen, J., in Reg. v. Serné, 16 Cox C. C. 311, limiting the old definitions of "constructive murder."

[15] The instances of the use of this phrase are, of course, very numerous. As remarked by Rugg, J., in Com. v. Mixer, 207 Mass. 141, 146, in an able opinion citing many Massachusetts cases in which the principle of action at peril was involved, a striking analysis of it has been attempted by Holmes, J., in Com. v. Smith, 166 Mass. 370, 375-6: "The statute means that people enter such place (gambling houses) at their peril. * * * When, according to common experience, a certain fact generally is accompanied by knowledge of the further elements necessary to complete what it is the final object of the law to prevent, or even short of that, when it is very desirable that people should find out whether the further elements are there, actual knowledge being a matter difficult to prove, the law may stop at the preliminary fact, and in the pursuit of its policy may make the preliminary fact enough to constitute a crime." Yet even to this statement the writers are obliged by their analysis to take exception. Selling food is the "preliminary fact." Adulteration is the "further element" to be prevented. The law does not make the former an offense unless accompanied by the latter. A simpler statement of the principle is found in 3 GREENL. EVID., § 21: "The law in these cases seems to bind the parties to know the facts, and to obey the law at their peril."

[16] Com. v. Farren, 9 Allen (Mass.) 489, (watered milk) is probably the leading American pure food case. In it Chapman, J., said (p. 490): "One of the reasons which induced the legislature ** was that they * * * regarded it as reasonable under all the circumstances that the seller * * * take upon himself the risk of knowing that the article he offers for sale is not adulterated * * *. If the legislature deem it important that those who sell * * * shall be held absolutely liable, notwithstanding their ignorance of the adulteration, we can see nothing unreasonable in throwing this risk upon them."

"Such an emergency may justify legislation which throws upon the seller the entire responsibility of the purity and soundness of what he sells and compels him to know and to be certain." Finch, J., in People v. Kibler, 106 N. Y. 321 (watered milk).

It is, therefore, possible to support the principle of action at peril in the criminal law on strictly logical grounds perfectly consistent with the necessity of the concurrence of the will. But lest we encounter pitfalls here, it should be pointed out that too great liberties may easily be taken with the "act" in order to apply this doctrine. Selling is an act, to be sure. Likewise operating or driving a vehicle, or navigating a ship, or running a railroad train, or conducting a manufacturing enterprise. And we are still within the principle of volition when we charge a master criminally for the consequence of the conduct of his servants, though prohibited by him. If the master is content with mere directions to his servant, which conceivably may be violated, he consciously assumes the risk of such violation and the result becomes voluntary as to him in this sense. On the other hand, however, it is submitted that "action" cannot be stretched to cover mere static conditions, such as possession, ownership, relationship and the like. Here the police regulation can only command prevention of the objectionable occurrence or abatement of the detrimental condition; the owner, proprietor, etc., may be forbidden to "permit," or to "suffer" the occurrence of the thing. But he cannot be punished if it happens against his will, actively asserted to the utmost degree within reason. He may be called upon to act, but not punished for things that happen without the causation of his failure to act.[17]

"The means which dealers in these products generally have of informing themselves as to the substance of which they are compounded are so ample that but few will suffer same through design or negligence, while no practicable degree of caution would protect purchasers; and it is manifest that the legislature has thought proper to incur the slight risk of injustice to the few in order to escape the greater risk of injustice to the many." Dixon, J., in State, Waterbury v. Newton, 50 N. J. L. 534, 537 (artificially colored oleomargarine). Similar expressions are found in Com. v. Waite, 11 Allen (Mass.) 264; State v. Schlenker, 112 Iowa 642, 51 L. R. A. 347.

Some one of the above expressions is employed, with slight variation, in State v. Kelly, 54 O. S. 166, 180; Com. v. Weiss, 139 Pa. St. 247; People v. Snowberger, 113 Mich. 86; Groff v. State, 171 Ind. 547; State v. Maurer, 255 Mo. 152, 168.

[17] Yet such a case has actually happened, and though the constitutional point presented herein was raised, it was brushed aside without much consideration on the authority of the misleading *dicta* which have been mentioned. See People v. Fernow, 286 Ill. 627, and People v. Johnson, 288 Ill. 442, in which cases it was declared to be within the "police power" of the

Moreover, we may return to the principle of action at peril to point out that there is a limitation inherent in the idea of the "peril" indicated by the statement of it. If the analysis herein attempted is sound, the gist of the offense in cases of action at peril is really omission; the actor is punished rather for something he fails to prevent or to discover than for something he does. Must not the objectionable occurrence be preventable or the objectionable fact discoverable by him? There are concessions in the cases indicating that judges have been troubled by this question, and some decisions squarely based on an affirmative answer thereto.[18] Yet the author-

state to punish a man for *having in possession* a motor vehicle the manufacturer's serial number on which had been defaced, though it might be that the defacement consisted of alterations impossible of detection, and had been made by another without any human possibility of knowledge on the part of the accused. The commentator, on page 1540 of 4 A. L. R., after abstracting the decisions relied upon by the Illinois court, says, "it will be seen that these cases are all cases of affirmative acts. * * * The elimination of criminal intent, while reasonable enough in some cases, is full of danger to the accused, even in cases where the statute punishes affirmative acts, and ought to be strictly limited in a day when the doctrine of the presumption of innocence has become unpopular. * * * A statute under which an innocent person, who does nothing, may be turned into a criminal by the act of another, for which he is not responsible, is startling to old-fashioned ideas. Under the Illinois statute, * * * what is the innocent owner of an automobile to do, who finds in the morning that the manufacturer's number of his car has been mutilated in the night? Is he to give himself up to the police as a criminal? Is he at once to destroy his car? Is there any way in which he can escape? It seems that he may even be apprehended before he knows of the mutilation."

The only answer found in the opinion of the court to these questions is as follows:

"Laws cannot be held invalid merely because some innocent person may possibly suffer. The principle of police regulation is the greatest good to the greatest number." How it could bring "good" to anybody to punish a man under these circumstances is not explained. (For a somewhat similar holding, considerably qualified, however, see Ford v. State, 85 Md. 465.) But the maxim of Bentham is misapplied; or else the police power must be redefined as the power to commit admitted injustice for the purpose of accomplishing some alleged public good, regardless of the appropriateness of the means to the end. Can such a definition be correct?

[18] See, generally, cases cited *supra,* notes 11, 12. In Com. v. N. Y. C. & H. R. R. Co., 202 Mass. 394, an extreme case the other way (see facts, abstracted *supra,* note 6), Bradley, J., said (p. 398), "no argument has been advanced, nor was there any proof at the trial, that by competent super-

ities generally either ignore it or stretch the theory of preventability or discoverability beyond all reason.[19] The pure food cases, representing as they do an absolute unanimity of decision, would seem to go to the very verge, if not beyond it, in their *dicta*.[20] They say, at least inferentially, that the fact of adulteration in the food sold could be discovered by analysis; but analysis of the contents of each separate container would be necessary. This, it is submitted, is an absurdly high degree of diligence. If within the bounds of

vision, even if necessarily required to be more or less constant, the defendant would not have been able to have prevented the mischief caused by the intermeddlers." See also International Harvester Co. v. Kentucky, 234 U. S. 216.

[19] Observe the language of Cooley, J., in People v. Roby, quoted *supra*, note 6: "The purpose being to require a degree of diligence for the protection of the public which shall render violation (*sic*) impossible." What the learned judge meant was, doubtless, that the degree of diligence required, if exerted, would render the objectionable event impossible. This raises the query as to whether the legislature can, under the Fourteenth Amendment, assume that human diligence is capable of detecting or of preventing absolutely a given deleterious happening, as against a possible showing of fact, in a given case, that such diligence at its best (a limited best, of course) was not or could not be capable of such efficiency. See the Massachusetts and Illinois cases referred to in notes 6 and 17, *supra;* also Com. v. Graustein, 209 Mass. 38; cases cited note 16, *supra.*

[20] See cases cited *supra*, note 16. All of these cases seem right as far as the actual decisions therein are concerned. In none of them was there a defense of excusable want of knowledge—*i. e.*, knowledge that it would have been utterly impracticable for the defendant to obtain; nor of fortuitous event, wholly beyond his control. But the *dicta* quoted would exclude such defenses, and such cases are by no means fanciful. See Brown v. Foot, 17 Cox C. C. 509; Jones v. Bertram, 58 J. P. 478 (adulteration by malicious act of third party; held no defense); Parker v. Alder, (1899) 1 Q. B. 20 (adulteration while in transit in hands of carrier after leaving possession of defendant; held no defense). Of course the British parliament is not limited to "due process of law." Again, the early cases afforded little possibility of raising any real issue. In none of them was the test made by the prosecution to establish the fact of adulteration impracticable for the defendant. But today many foods are sold in sealed packages. If a retailer should open a package for testing purposes its value would be destroyed; and he must test every package if he is to be absolutely sure. See Com. v. Mixer, 207 Mass. 141. In Adams Express Co. v. Com., 129 Ky. 420, the right of a carrier to inquire into the contents of a package and then to find out whether or not it contains contraband liquor was assumed to be a necessary predicate of fastening criminal liability upon it.

physical possibility, it is so in a purely academic sense. But even the approval of the erection of such a standard of conduct falls short of establishing that criminal liability may constitutionally be predicated upon the happening of what it would have been literally impossible to prevent. Occurrences theoretically preventable may, nevertheless, be practically unavoidable; and when so, the public necessity of casting upon persons the duty of exercising extreme care to prevent them cannot be stretched so as to make them insurers against the events, even when such occurrences are possible concomitants of positive action which may be "regulated" under the police power.[21]

At the risk of breaking the thread of the argument, brief notice may be taken of the philosophical basis of punishment. It is believed that the numerous theories which have been put forth from time to time are reducible to four principles. Punishment is variously said to be based upon (1) vindication, (2) retribution, (3) reformation, or (4) prevention (or repression). The first two of these have not been considered, for our constitutional theories of "due process of law" have never taken them into account. Reformation is *ex hypothesi,* a process of moulding the will. Prevention alone seems objective in its outlook; that is, it seems to regard the avoidance of a detrimental result as the end of the law, and punishment as the means of its attainment. Suppose we accept prevention as a sound philosophical basis for punishment. It is cer-

[21] See notes 11, 12, and 18, *supra.*

In International Harvester Co. v. Kentucky, 234 U. S. 216, 223, Mr. Justice Holmes said: "If business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determined facts would be upon the imagination and desires of purchasers, is to exact gifts that mankind does not possess" (holding Kentucky anti-trust law—constitutional and statutory —to be violative of the Fourteenth Amendment).

See also prevailing opinion of McClain, J., in State v. O'Neil, *supra,* note 11. People v. Cipperly, 101 N. Y. 634 (adopting dissenting opinion of Learned, J., in 37 Hun 324) may be thought to be a decision squarely opposed to the text. It is not so, however, as an examination of the case will show. People v. Johnson, 288 Ill. 442, and People v. Fernow, 286 Ill. 627, *supra,* note 17, are opposed to the text.

tainly the ground most frequently, if not always, taken in justifying an exercise of the police power. There must, nevertheless, be a perceptible and legitimate relation of the means to the end if our constitutions are to have any meaning at all. For if the infliction of the punishment is justified on the ground that it will tend to discourage and thereby to prevent the happening of the event sought to be guarded against, and no standard by which such tendency may be established is set up, but the legislature is made the final judge thereof, the consequences are startling.

The favorite reason for excluding the defense of want of knowledge in the pure food cases is that in no other way could the public be protected against adulteration.[22] The idea of the relation of means to a preventive end is here perfectly patent. It would seem most obvious that sellers will be spurred to the exercise of the extreme diligence which the law requires by the knowledge that proof of their ignorance of the fact of adulteration would be futile in a prosecution. The exercise of that degree of diligence will tend to prevent the evil aimed at.

But may not even this application of the principle be illegitimately made? For example, can we argue from this that punishment can be justified in all cases by the mere fact that the thought of the penalty and the hopelessness of avoiding it will terrify men

[22] "It is of the greatest importance that the community shall be protected against the frauds now practiced so extensively and skillfully in adulteration." Chapman, J., in Com. v. Farren, 9 Allen 489, 490.

"Experience has taught the lesson that repressive measures which depend for their efficiency upon proof of the dealer's knowledge * * * are of little use and rarely accomplish their purpose." Finch, J., in People v. Kibler, 106 N. Y. 321, 324.

"The object was * * * to prevent acts which in their results operated unjustly upon others. This object would be thwarted if sales could be made with impunity by those ignorant of the ingredients of the articles sold." Dixon, J., in State, Waterbury v. Newton, 50 N. J. L. 534, 537. "It is a plan devised by the general assembly to protect the public against the hurtful consequences of the sales of adulterated foods, those consequences being in no degree increased by the vendor's knowledge, or diminished by his ignorance, of the adulteration * * *. It would have been inconsistent with that purpose to provide for the trial of such immaterial issues as * * * the extent of his knowledge * * *." Shauck, J., in State v. Kelly, 54 Oh. St. 166, 178. See Com. v. Weiss, 139 Pa. St. 247; 11 L. R. A. 530; dissenting opinion of Earl, J., in People v. Arensberg, 103 N. Y. 388, 394.

and women into an observance of the laws? Thus, could the abolition of the defense of *alibi* be likewise justified? Of course not, one says. That would be absurd; because *alibi* consists of proof that the defendant did not commit the crime at all, and you cannot constitutionally punish a man for a crime he did not commit. To which it may be replied that there is no perceptible difference between punishing a man for a criminal act he did not commit and punishing him for the happening of an event which he did not will and could not prevent as a criminal act which he did commit.

Again, one must concede that the punishment of all the members of the family of the principal offender as accessories would have a theoretical tendency to prevent crime by inciting persons to watchfulness over the conduct of members of their families. Would such a law be constitutional in the United States, however consistent with primitive law it may be?[23] It is submitted that the justification of punishment on the basis of prevention goes no further than this: punishment may be imposed for a voluntary act, because it will deter other like voluntary acts; it may be imposed for omission to act when the omitted action is possible and would prevent the evil, because it will stimulate the desired action. But it cannot be imposed because of a mere occurrence, coupled with a static condition which has no causal connection with the occurrence, because it will not prevent either the condition or the occurrence; it cannot be imposed because of a mere occurrence, coupled with an act or omission itself lawful, for the same reason.

It may be desirable here to take note briefly of a collateral question. It is sometimes intimated that a defense may be taken away on the sole ground that it is easy to simulate and hard to refute when simulated.[24] Is this true? If so, there must be boundaries

[23] See F. W. MAITLAND, "THE CRIMINAL LIABILITY OF THE HUNDRED," I COLLECTED PAPERS, 230. The wergild, the blood-feud, and other primitive institutions were manifestly not punishments—see MAITLAND, "THE KINDRED AND THE BLOOD FEUD," *id.* 202, 217.

[24] "One of the reasons which induced the legislature * * * undoubtedly was that they regarded it as impracticable in most cases to prove the knowledge." Chapman, J., in Com. v. Farren, 9 Allen 489, 490.

"Purpose and knowledge, except when they are indicated by the character of the forbidden act, are in most cases insusceptible of proof. If this statute had imposed upon the state the burden of proving the purpose of

within which such a principle is confined. For, obviously, the surest method of convicting a person charged with crime is to presume him guilty on proof of the *corpus delicti,* and admit no defense whatever. This would be, of course, an absurdity. Yet it is capable of being supported on the theory under discussion, if we admit that the legislature, in order to prevent a given class of detrimental occurrences, may "deprive" persons charged with bringing them about of a "defense" because of the difficulty of refuting it, so as to insure efficient enforcement of the law. It is believed that there can be no deviation from the principle for which we contend, and that punishment cannot constitutionally be predicated, under the theory of prevention, upon a state of facts which, in the exercise of a high degree of diligence, could not have been discovered or obviated by the effective interposition of the will of the accused.[25]

the vendor * * * or his knowledge of its adulteration, it would thereby have defeated its declared purpose." Shauck, J., in State v. Kelly, 54 Oh. St. 166, 179.

[25] Care must be taken to distinguish between the effect of shifting the burden of proof for such a purpose and excluding proof altogether. The erection of disputable presumptions to supply evidence which it is difficult for the prosecution to produce is inherent in every system of criminal jurisprudence; thus, every man is presumed to intend the consequences of his voluntary act, when "specific intent" is in issue; every man is presumed to be sane; so it is no deviation from principle to make an event *prima facie* proof of the commission of an offense by a defendant having some perceptible relation to the event; Adams v. N. Y. (1903), 192 U. S. 585, relied upon by Professor Rood in his article criticising State v. Strasburg, cited *supra,* note 12, is of this type; and see 2 WIGMORE, EVIDENCE, §§ 1353, 1354; 2 L. R. A. (n. s.) 1007, note. Compare State v. Beswick and State v. Kartz, cited *supra,* note 11; Hammond v. State, 78 O. S. 15; and State v. Divine, 98 N. C. 778. (The Beswick case is probably wrong, as it belongs in the first class. See WIGMORE, *loc. cit.*)

Ford v. State, 85 Md. 465, 41 L. R. A. 551, cited by Professor Rood, though a strong and somewhat questionable decision, is clearly distinguished in that the substantive offense therein was having lottery books and slips in possession, and the rejected defense was lack of knowledge as to the character of the articles. It is not difficult to support the reasonableness of a requirement that one shall ascertain the nature of lottery tickets before receiving them in possession. As the court well said (p. 477), "we cannot imagine how anyone finding either of them on the street would be induced to take it into his possession unless he knew what it was, for it seems to be merely a collection of figures and letters so arranged as to be uterly

It is also submitted that due process of law requires that the standard of diligence shall be within the bounds of human possibility.[26] The courts must determine this question, of course, and not the juries, and in so determining they should at all times have a sympathetic regard for the social aims of the legislature. Yet it is conceivable that legislatures may transcend the limits of reason, and where this occurs the courts should be courageous to declare the consequences, however strongly it may be argued that the public interest requires the opposite result.

It has been frequently intimated that the comparative severity of the punishment is a factor to be taken into account in deciding questions like that under discussion,[27] though there are cases in

unintelligible to anyone not learned in the business." But see the comment of the annotator in 4 A. L. R. 1538, 1540, relating to People v. Johnson, (1919) 288 Ill. 442.

[26] See *supra,* notes 18 and 21. It is often said that the safeguard against the occasional injustice which any rational man must concede will be very likely to occur if "action at peril" is an unlimited principle is to be found in "an appeal to the prosecuting officer, or, in the last resort, to the executive clemency" (John W. May, "Mens Rea," 12 AM. L. REV. 469, 478). Many of the cases cited herein contain statements to this effect; *e. g.,* Ford v. State, *supra,* note 25 (see the judgment in Com. v. Mash. (Mass.), 7 Metc. 472). The ancient practice in cases of "misadventure" may be recalled. *Are these means of securing justice "due process of law"?* Compare McClain, J., in State v. O'Neil, 147 Ia. 513, 33 L. R. A. (n. s.) 788, 794, and Mr. Justice Holmes in Harvester Co. v. Kentucky, *supra,* note 24.

[27] The power to define crime and impose penalties is not plenary. As said by Mr. Justice Brown in Lawton v. Steele, 152 U. S. 137, "To justify the state in thus interposing its authority in behalf of the public, it must appear,—

"First, that the interest of the public generally * * * requires such interference, and—

"Second, that the means are reasonably necessary for the accomplishing of the purpose, and not unduly oppressive upon the individual."

Most of the cases where conviction has to be upheld, where there was no *mens rea,* have been convictions involving reasonable fines. It is one thing to impose a fine upon a person for selling adulterated food and another thing to put a man to death or even in the penitentiary for the same or a similar offense.

"The nature and extent of the penalty attached to the defenses," says Wills, J., in Regina v. Tolson, 23 Q. B. D. 168, 177, "may reasonably be considered. There is nothing that need shock any man from the payment of a small pecuniary penalty by a person who has unwittingly done something to the public interest." "There are other cases," says Channell, in

which the materiality of this point has been, at least inferentially, denied.[28] In this paper no account has thus far been taken of this

(1910) 2 K. B. 55, "where the legislature desiring absolutely to prohibit certain things from being done has made the person who infringes the statutes liable to punishment *at any rate by a penalty,* notwithstanding the fact that he himself is innocent." Mr. Justice Wright, in Sherras v. DeRutzen, (1895) 1 Q. B. 921, says: "Apart from isolated and extreme cases * * * the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush, J., in Davies v. Harvey, L. R. 9 Q. B. 433, are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty." The second comprises public nuisances, and the third cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right." (Quoted with approval in Toppin v. Marcus, (1908) 2 Ir. R. 423.) See also Ry. v. U. S., 220 U. S. 559, 577.

Sometimes the courts in discussing the necessity of intent distinguish between acts *mala prohibita* and acts *mala in se.* As recently as the case of Hays v. Schueler, 107 Kansas 635, the court says: "The distinction between offenses of this character (keeping automobile rear lights lighted) and those involving conduct *malum in se,* and so *necessarily requiring an intent to do wrong,* is illustrated in the case of State v. Eastman, 60 Kan. 557." In U. S. v. Leathers, Federal Cases 15,581, the court says, "where acts are not *malum in se* or infamous, but only wrong because prohibited, criminal intent need not be shown." Insofar as by *malum in se* is not meant crimes calling for a specific criminal intent there is no basis for the distinction made in these cases. The only difference in these two kinds of crimes, so far as the right to punish where there is no intent is concerned, is that in one the punishment is likely to be of a far more severe character, as indicated above.

The clearest expression of the view that the character of the penalty marks the limits of the power to punish in the absence of intent is seen in People ex rel. Price v. Sheffield Farms Co. (225 N. Y. 25), where the New York Court of Appeals says: "There was power in the legislature to impose this stringent penalty and to punish offenders by fine, moderate in amount. In this and like cases the duty to make reparations to the state when the *reparation does not go beyond the payment of a moderate fine* is a reasonable regulation of the right to do business by proxy. In such matters differences of degree are vital. *Even a fine may be immoderate. But in sustaining the power to fine we are not to be understood as sustaining to a like extent the power to imprison.* This case does not require us to decide that life or liberty may be forfeited without tinge of personal fault." Crane, J., in a concurring opinion says: "To this extent I concede that the employer is liable irrespective of his knowledge or negligence, *but when an employer may be prosecuted as for a crime to which there is affixed a penalty of imprisonment for an act which he can in no way prevent, we are stretching the law regarding acts mala prohibita beyond its legal limitations.*"

[28] See Shevlin-Carpenter Co. v. Minn., *supra,* note 3.

question. Indeed, it may be affirmed that all that has been said relates to every case of punishment, however slight. But it is believed that the principle of necessity coördinating with that of prevention does produce variable results. Just as it has been suggested that civil liability might be justified where punishment might be too drastic as a method of the police power, so it may be submitted that greater public necessity must be shown to justify the punishment of death or that of imprisonment than might be required to support a slight fine. This statement is made as a proposition of constitutional law, and should of course be qualified in the usual way by saying that the exercise of the legislature's discretion will not be overthrown on slight or even logically persuasive grounds, but that a clear conviction of abuse of discretion must lay hold of the judicial mind before the law will be held unconstitutional because of the undue severity of the penalty.

In approaching the discussion from the historical point of view, it has been assumed that the common law invariably annexed the element of "intent" to the objective occurrences which it punished as crimes. As a necessary result of such an assumption, our problem is limited to the field of statutory law, and we have dealt with the constitutional limitations on the power of the legislature to reduce the subjective content of crime. It should be stated, however, that the assumption is not strictly true. The common law did predicate punishment upon occurrences devoid of some of the elements of "intent" as that term was generally understood. The offenses of this class were variously denominated "quasi-crimes" and "public torts."[29] Though sometimes characterized as not crimes at all, save in a procedural sense,[30] it is clear that they satisfy our

[29] See classification of offenses adopted by Professor BEALE in his "CASES ON CRIMINAL LAW." See also note 27, *supra.*

[30] See note 27, *supra,* Reg. v. Stephens, L. R. 1 Q. B. 702; Sherras v. De Rutzen, *supra,* compare Chisholm v. Doulton, 22 Q. B. D. 736, per Field, J.; Professor Keedy, *op cit., pp.* 543-545 inclusive, seems to adopt this view, and asks "why should not an insane person pay a pecuniary penalty in such cases just as he must pay damages for his private torts?" This question, it is submitted, evinces failure to appreciate the significance of the punishment embodied in a mere verdict of guilty. See Ballantine, *op cit., infra,* note 34.

The existence of a real distinction between *mala in se* and *mala pro-*

definition of a crime, and must be included within the scope of this discussion. And if it should appear that the element of intentionality, or the concurrence of the will, as described herein, is absent from any of these offenses, the principle laid down by the writers would, perhaps, be overthrown; for it may be supposed that "due process of law" preserves to the individual no greater immunity from purposeless and wanton punishment than was accorded to him by the later common law.[31] No case has been found, however, in which a common law conviction for a "public tort" or "quasi crime" was sustained as against the defenses outlined in this paper. The closest case is consistent with the principle for which we contend as applied herein to the delegation of duties and prohibitions imposed by law.[32]

A much more serious question is raised by the state of the law in many jurisdictions on the subject of emotional insanity. The attempt of an American state to abolish the defense of insanity while retaining the definitions of crimes unchanged may be a violation of the constitutional right of trial by jury.[33] With that we have nothing to do. We may likewise concede that the mental capacity required as the basis of punishability is merely that which the particular subjective content of the specific offense requires.[34]

hibita—between "crimes" and "violations of police regulations"—may be admitted without yielding the point contended for herein. There is no doubt that some of the possible philosophical bases for punishment are lacking in the case of mere "police regulations." The outrage or "hatred" of which Stephen speaks does not characterize the public view of their violation—though even here the ground is debatable. (See VON BAR, "HISTORY OF CONTINENTAL CRIMINAL LAW" (Continental Legal Hist. Series, Appendix, § 110). The point, however, is that punishment is just as real when imposed for one reason as for another.

[31] See Den ex dem Murray v. Hoboken Land and Improvement Co., (1855), 18 How. (U. S.) 272.

[32] See cases cited *supra*, notes 27, 30.

[33] State v. Strasburg, 60 Wash. 106.

[34] See report of committee of American Institute of Criminal Law and Criminology, embodying a proposed law providing a test for determining criminal responsibility in cases wherein the issue of insanity is raised. The report is published in 2 JOURNAL CRIM. LAW AND CRIMINOLOGY, 521, and is ably advocated by the chairman of the committee, Professor Edwin R. Keedy, in 30 HARV. L. REV. 535 and 724 (1917). A penetrating criticism of

We lay on one side, therefore, the question as to whether inability, through mental disease or lack of mentality, to distinguish between right and wrong as to a particular course of conduct, or sanely and normally to perceive the actual facts surrounding such a course of conduct, is material in the case of offenses having the smallest possible subjective content, as selling adulterated food.[35] We may even assume the validity of legislation expressly creating a new catalogue of crimes of the insane and the feeble-minded, though we are not aware of the existence of any such legislation.[36] The principle developed herein requires us, however, to question whether it is due process of law to punish a man for doing that which he cannot refrain from doing, or for omitting to do that which his limited mental powers disable him from doing.

We encounter at once, of course, a question of fact. Is there such a thing as volitional insanity or paralysis of the will? Discussion of this question would be out of place here. It is frequently asserted as a fact, however, that such mental states exist. If so, what account must the law take of them and how does the principle for which we contend operate upon them?

The fear of consequences is doubtless at the bottom of the reluctance of some of the courts to admit volitional insanity as a defense.[37] They have instinctively, and no doubt correctly, surmised that "irresistible impulse" and the like are in most instances despairing and

it (well founded, it is believed) is made by Professor H. W. Ballantine in an address published in 9 JOUR. CR. LAW AND CRIMINOLOGY, 485; see also editorial note in 30 HARV. L. REV. 179.

[35] But see Ballantine, *op. cit.*, note 34.

[36] The recognition of the principle of "partial responsibility" contended for by Mercier, *op. cit.*, note 8, and supported by Keedy, speaking for the committee of the American Institute of Criminal Law and Criminology, would seem to involve some such legislative policy.

[37] Bramwell, B., in Reg. v. Haynes, 1 F. & F. 666, 667; Rolfe, B., in Reg. v. Stokes, 3 C. & K. 185, 188; Brannon, J., in State v. Harrison, 36 W. Va. 729, 751; Andrews, J., in Flanagan v. People, 52 N. Y. 467; Gibson, C. J., in Commonwealth v. Mosler, 4 Pa. St. 264; Davis, J., in People v. Coleman, 1 N. Y. Crim. R. 1, 3; McGowan, J., in State v. Bundy, 24 S. C. 439, 445; Valentine, J., in State v. Nixon, 32 Kan. 205, 212; Sherwood, J., in State v. Pagels, 92 Mo. 300; Com. v. Rogers (Mass.), 7 Metc. 500; State v. Harrison, 36 W. Va. 729; State v. Knight, 95 Me. 467. See BEALE'S CASES, p. 463; MIKELL'S CASES, p. 156; 27 L. R. A. (n. s.) 461, note.

flimsy pretexts, without foundation in fact. They have distrusted alike the accuracy and probity of expert witnesses, the ability of the prosecution to unmask the spurious defense, and the good sense of the jury to discern the truth. In short, they have felt the incapacity of the whole system of criminal procedure to produce right results in cases of this character.

But it is impossible to perceive why the danger of a miscarriage of justice is any greater, if as great, when volitional insanity is recognized, than it is when purely perceptive incapacity is admitted as a defense. It is suggested that it is a mere historical accident that medical science happened to discover perceptive insanity first.[38] It might easily have happened that the attention of the courts had been first directed toward volitional insanity. In that event the "right and wrong test" would have been the radical thing—the advanced step. There is nothing more inherently strange or unreal to the lay mind in the one type of mental disease than in the other, solemn judicial *dicta* to the contrary notwithstanding. The criminal law has always known and recognized the existence of the will.

It thus appears (1) that there is no ground for distinguishing between different types of insanity on account of any variation among them with respect to the difficulty of refuting spurious defenses; and (2) that it is doubtful that there is any such widespread and deep-rooted belief, whether erroneous or not, in the impossibility of volitional insanity, as has been held to justify legislation, such as compulsory vaccination, etc., based upon popular support of one side of a scientific controversy.

But even if it were possible to brand volitional insanity as a peculiarly suspicious defense, and even if one might bring to the support of its denial a supposititious popular conviction of its nonexistence, it is submitted that the principle contended for in this paper would require its recognition. We have already disposed, in a way, of the point respecting the difficulty of refuting defenses. At the risk of repetition, it may be added that to say that a man can be conclusively presumed to will the motions of his body or

[38] The fortuitous character of the opinions in M'Naghten's Case, 10 Clark & F. 200, and the curious fashion in which the answers of the judges to the moot questions propounded by the House of Lords have become embedded in our law to a greater or less extent are too well knwn to require recital or comment.

to will his failure to act is false on its face.[39] The only possible way of putting the opposing theory so as to display it in its true colors is to say that what a man wills or does not will is immaterial in the criminal law. This cannot be so, because every possible justification for the pains of punishment must find its basis in an exercise of the will of the offender.

Nor can the rule which has been adhered to by the courts of some states be sustained on the theory that it merely applies the popular belief, and therefore is the law. Constitutional limitations protect the one against the many, or they are of no significance whatever. True, a public offense may consist of the refusal of the individual to yield his point of view to that of the majority, however erroneous the latter may be.[40] So due process of law does not entitle one to question the propriety of legislation circumscribing his own will so as to make its outward manifestations conform to the social will. But due process of law does entitle him to object with effect to the visitation of punishment upon him for an occurrence toward which any will of his own had no causal relation.

Again risking repetition, it will not do to seek justification for the rule which repudiates the defense of emotional insanity in the supposed deterrent effect such a rule will have upon the conduct of the normal.[41] For, as has been stated, such a principle would

[39] See quotation from State v. Nicolls, 61 Wash. 142, 145, *supra*, note 6. Other instances of this medieval application of the principle of *mens rea*—*i. e.*, assuming its universality and then "supplying" or "presuming" the necessary facts in certain cases by a legal fiction—are found in State v. McBrayer, 98 N. C. 619, 623-4 (quoting other North Carolina cases). Particularly, in this jurisdiction, see State v. Brandon, 8 Jones, 463, wherein it is said, "if the prisoner knew that what he did was wrong, the law presumes that he had the power to resist it, against all *supernatural* agencies, and holds him amenable to punishment."

[40] *E. g.*, offenses under the compulsory vaccination statutes; or bigamy statutes as applied to Mormons; or medical practice acts as applied to Christian Scientists and non-orthodox "healing" cults.

[41] "I do not think that it is expedient that a person unable to control his conduct should be the subject of legal punishment. The fear of punishment can never prevent a man from contracting a disease of the brain, or prevent that disease from weakening his power of controlling his own actions. * * * Such punishments are not really necessary, or even useful, for the protection of society. They cannot by the hypothesis be useful by way of example, for I am dealing with the case of those who cannot control their

justify the most horrible and outrageous reprisals upon the wholly innocent, such as the capital punishment of a whole community of negroes for the unspeakable crime of one of them in order to terrorize into peaceability the members of the race generally. The line must be drawn somewhere; and it is submitted that, whatever be the philosophical basis of punishment, it cannot, with justice, be predicated otherwise than upon the rebellious will of its victim.

If our arguments are sound, the individual in the United States has a constitutional immunity from punishment attributed to an event not the product of the inharmony of his will with that of the state. This being so, the alleged hapless victim of the "irresistible impulse" has a constitutional right to go to the jury with proof of the existence, the nature and the subjective effect of his affliction. No case has been found, however, in which the constitutional aspect of the question has been considered apart from the statute.[42]

Care must be taken here to distinguish between "punishment" as conceived of herein and other usages to which the state may attempt to submit the individual. Reference to the opening paragraphs of this article will show that there is at least implicit in the definition there framed the thought that punishment is the legal consequence of an event. It is predicated in necessary part upon a happening, a delict. The plea of defense is "not guilty" of the crime charged; and the verdict of "guilty" is itself a punishment, as it carries the stigma of condemnation with it There may be restraints of individuals and possibly even corporal inflictions, which are not imposed as punishment at all. Detention in hospitals for the insane is referable to the police power, no doubt;[43] but such confinement is justified by fear of what the insane person is and may therefore do rather than as a punishment for what he has done. The distinction is perfectly familiar; and all questions as to due process of law in commitments to such institutions and other legal consequences of adjudicated status are outside the scope of this article. Mention may be made of one, however, suggested by the

conduct. To threaten such a man with punishment is like threatening to punish a man for not lifting a weight which he cannot move." STEPHEN, HIST. CR. L., Ch. XIX, Vol. 2, pp. 171, 172.

[42] See State v. Strasburg, *supra*, note 33.

[43] FREUND, POLICE POWER, Ch. X.

English statutes relating to criminal procedure where insanity is the defense. It is submitted that a verdict of "guilty though insane" cannot constitutionally be reached where the insanity is volitional in the exact sense; and that wheresoever the consequences which the state attempts to attach to such a verdict, or to a verdict of acquittal on grounds of insanity which is volitional, or to an adjudication of such insanity in case of a prisoner charged with crime, is detention in an asylum for life or for any fixed period, regardless of the alleviation or cure of his mental disease, such consequence amounts to and is punishment and not custody referable to status; and being such, the imprisonment after a cure is effected would be a deprivation of liberty without due process of law.[44]

[44] State v. Strasburg, *supra,* note 33 (concurring opinion of Buckin, J., p. 130). In re Boyett, 136 N. C. 415, Underwood v. People, 32 Mich. 1. The English act is known as the "Trial of Lunatics Act" (1883), 46 and 47 Vict., c. 38. See report of committee of Institute of Criminal Law and Criminology, printed in the JOURNAL OF THE INSTITUTE, Vol. 2, pp. 521, 530, which gives the text of the English statute and several American statutes modeled after it (Indiana, Nebraska, Hawaii, Massachusetts, Rhode Island, South Dakota), together with the proposal of a committee of the New York State Bar Association (1911) framed along similar lines. Some of these statutes are believed to be unconstitutional and all of them are rightly criticised by the committee in its report (see p. 531), though not expressly on constitutional grounds. It is strange that the reasoning of some of the cases cited herein has apparently been overlooked, and the distinction between the omnipotence of the British parliament and the limited powers of an American legislature forgotten. See, however, John R. Rood, "Statutory Abolition of the Defense of Insanity in Criminal Cases," 9 MICH. L. REV. 126, wherein it is contended that State v. Strasburg is unsound, that the English act does not deny due process of law in the American constitutional sense, and that Underwood v. People and In re Boyette are to be distinguished. In some respects Professor Rood's criticisms may possibly be accepted; but that the writers must hold that he falls into at least two fundamental errors, both discussed in the text of his article, will be apparent from the following quotations:

"Insanity as a defense * * * goes only to the existence of criminal intent. And that the legislature may make the doing of the prohibited act a crime regardless of the intent with which it has been done is a proposition which has heretofore been generally admitted. * * *" p. 132 (citing State v. Constatine, 43 Wash. 102, and other "knowledge" cases). This, it is submitted, is the familiar error of failing to distinguish between knowledge and volition. "The defense of insanity is not based on any supposition that the insane person does not know what he is doing, but merely that he does not

The following conclusions have been reached:

1. The ancient maxim, *"actus non reum nisi mens rea,"* is full of meaning and has universal application, if *"actus"* be translated as "event," *"mens"* as "will," and *"rea"* as meaning "exercised in disobedience to the command of the law," or "not exercised in obedience to that command when such obedience is possible."[45] That is to say, there is an invariable principle to the effect that a mere event is not a crime on the part of a human being; but crime consists in the opposition of the individual will to the will of the state, having perceptible causal connection with a given event.

2. "Due process of law" guarantees to the individual immunity from punishment on account of that which is not a crime; *i. e.,* an event not contributed to by the exercise or non-exercise of his will.

3. The status of the individual may be affected, and as a result

know it is wrong because he is laboring under a delusion which produces a mistake of fact, causing the act to appear to the insane person innocent. He knows what he is doing and intends to do it; but he does not know it is wrong, and that is the reason he is excused from liability."

If this statement were true in *fact,* as distinguished from being accurate in law (as to those jurisditions which deny the volitional test), one would have to agree that, like other *mistakes of fact,* the insane delusion might be made immaterial by statute. But few now contend that delusion affecting the correctness of perceptions constitutes the full mental effect of even the most limited types of insanity. See Mercier, *op. cit.,* note 8, *passim.*

[45] It is, of course, not contended that the suggested application of the maxim is historically correct. We shall be misunderstood if the arguments we have employed are interpreted as directed to the point that the above translation represents what the first users of the phrase had in mind. On the contrary, it is believed that they meant "act" in the exact sense, and "mind" in the sense of "intent"—*i. e.,* perception. See STROUD, "MENS REA," 20; ENDLICH, "THE DOCTRINE OF MENS REA," 13 CR. LAW MAGAZINE, 831, 834. So it is perfectly correct for the courts to conclude, as they did ultimately conclude, that *"mens rea"* is not an indispensable element of crime—that the maxim is not of universal application. Our purpose has been to show that, though the maxim itself is not universally true, there is a principle that does have universal application; and for purpose of emphasis, it has been thought not inappropriate to paraphrase the maxim to secure an apt statement of the true principle. The paraphrase is, therefore, not a more perfect translation of what its early users meant, but a statement of what they might better have laid down if they had in mind a universal principal. And the theme is that when the lack of universality of the maxim was established the courts and writers were slow to discover the true universal principle.

he may be placed under restraint and, perhaps, suffer physical pain, because of what he is; but he can only, consistently with due process of law, be *punished* for what he has done or failed to do,—that is, for his rebellious conduct; and there can be no conduct without will.

4. No exception can be made to the application of the principle on grounds of expediency, such as (1) the difficulty of refuting a defense; (2) the more effectual enforcement of a police regulation; nor on the ground of (3) an overwhelming public opinion to the effect that punishment should follow the fact, and the will should be ignored as to any particular offense or any particular class of circumstances negativing the concurrence of the will.

5. The fact that the ancient maxim was misconceived and applied so broadly as to cover such mental states as purpose, knowledge of particular facts, knowledge of the law, and ability to distinguish between right and wrong, does not justify either its repudiation *in toto* or its non-application to the field of so-called "statutory crimes," when it is properly defined. In reality, the principle is embodied in the old term "general criminal intent" as distinguished from "specific intent," of which these other subjective facts are the elements; and may be expressed by the statement that general criminal intent, properly understood, is a necessary element of all crimes.

6. The principle is not disproved by the fact that the common law recognized a class of offenses described as "quasi-crimes" or "public torts," because there is no evidence that criminal intent, as we have defined it, was absent from such offenses.

7. "Due process of law" not only imposes upon the police power of the state in the creation of crimes the absolute limitation which has been pointed out; but requiring as it does (1) that every restraint upon the freedom of the individual will and every compulsion exerted upon individual conduct be justified by what strong and preponderant public opinion sanctions as necessity, and (2) that no more drastic methods of regulating human conduct be employed than like necessity justifies, constructs a double additional limitation which may, in theory at least, and where palpably violated on the one score or the other, invalidate criminal legislation under the guise of that power. (No account is taken of the operation of other constitutional limitations, such as those respect-

ing *ex post facto* laws, the denial of the equal protection of the laws, etc.)

8. Due process of law requires that the standard of diligence exacted by criminal legislation embodying the principle of "action at peril" shall be within the bounds of human possibility, however great the strong and preponderant public opinion may deem to be the peril against which safeguards are to be created.

9. The rule prevailing in many states, whereby volitional insanity is ignored, and evidence of it withheld from the jury, is a denial of due process of law.

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